United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-4237

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

SPERRY SYSTEMS MANAGEMENT DIVISION,
SPERRY RAND CORPORATION,
Intervenor,

v.

LOCAL 445, INTERNATIONAL UNION OF
ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,
Respondent.

On Application for Enforcement of a Supplemental Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether the Board's supplemental order reasonably applies its broad discretion over choice of remedies.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),

for enforcement of its supplemental decision and order, issued on January 16, 1975, against Local 445, International Union of Electrical, Radio and Machine Workers, AFL-CIO (the "Union"), and reported at 216 NLRB No. 30. The Board's decision was unanimous (Acting Chairman Fanning and Members Jenkins, Kennedy and Penello).

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board, after remand from this Court, found that the Union violated Section 8(b)(3) of the Act by invoking the parties' contractual grievance procedure in order to gain representative rights with respect to employees it was not entitled to represent. The Union does not challenge the propriety of that finding; in this proceeding it objects only to certain aspects of the Board's remedial order.

A. The original proceedings before the Board and in this Court

1. The Board's decision

In its original decision[1] the Board found that the Union did not violate Section 8(b)(3) of the Act by its efforts to secure the Company's compliance with an arbitration award requiring the Company to apply the parties' New York area contract to a plant in Vallejo, California. The facts upon which the Board based its order are summarized below.

In 1962, the Board certified the Union as the exclusive bargaining representative of Company drafting employees in a Metropolitan New York

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[1] 202 NLRB 183 (1974).

City unit. In 1963, the parties executed a contract applicable to "all plants now operated . . . wherever situated" (Article I). Succeeding contracts contained identical language.

In the spring of 1970, the Company opened a facility in Vallejo, California, where it employed, among others, three individuals who performed drafting work similar to that done by the New York employees. Soon afterward, the parties, in New York, executed their 1970-1973 contract. The Union subsequently learned of the drafting work performed at the California facility, and found that the California employees were under-classified, and therefore underpaid. The Union thereupon filed a grievance seeking to apply the contract to the California plant. An arbitrator concluded that the California plant was not an accretion to the New York unit and that the entire contract could not be applied to California employees. However, he held that, because the parties had intended Article I as a work preservation clause, the Company must apply the non-representational portions of the contract to the California facility.

Several weeks later the Union filed a representation petition seeking an election in a residual unit of draftsmen and clerical employees at the California plant. The Union lost the election by a vote of 2-0, with one challenged ballot.[2]

Meanwhile, the Union attempted to secure compliance with the arbitration award. It argued that the award did not prevent the Company from granting better terms of employment in California and requested that

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[2] The Union filed timely objections to the election, alleging the discriminatory discharge of two draftsmen and a clerk. Subsequently, the Union charged that this conduct also constituted an unfair labor practice. The Regional Director dismissed the charge and certified the results of the election.

California employees be reimbursed for lost contract benefits. The Union also filed a second grievance, alleging a violation of Article I as interpreted by the arbitrator, in the layoff of two California draftsmen; the Union sought their reinstatement with backpay.

The Company filed an unfair labor practice charge with the Board, alleging that the Union had failed to bargain in good faith with respect to the certified unit. It also petitioned the state court to vacate that portion of the arbitrator's award requiring the application of the non-representational aspects of the contract to the California employees. The court did so, holding that the arbitrator had exceeded the scope of his authority and that his award required the Company to violate the Act.[3]

The Board (Members Kennedy and Penello dissenting) dismissed the complaint, concluding that the Union did not violate Section 8(b)(3) by seeking to enforce its arbitration award. The Board found that the Union's primary objective was preservation of work for the New York City unit, and not recognition as the representative in California. The Board further found that the Union took no action which would disrupt the New York bargaining relationship.

2. This Court's decision

This Court (Judges Danaher, Lumbard, and Timbers) granted the Company's petition for review, vacated the Board's order, and remanded the case for further proceedings consistent with its opinion.[4] The Court,

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[3] After the decision of this Court herein, the state court's order was affirmed on appeal.

[4] 492 F.2d 63 (1974), cert. denied, 419 U.S. 831.

noting that the California plant constituted a separate bargaining unit, concluded that the Board's finding that the Union's efforts were non-representational was not supported by substantial evidence. The Court found that the reinstatement demand with respect to the California employees demonstrated that the Union's primary objective was representational. The Court added: "It strains credulity to believe that the Union honestly believed that its New York unit consisting of a large number of employees was significantly threatened by a single draftsman working for lower wages almost three thousand miles away" (p. 68).

The Court further held that the subject of the California employees' wages and working conditions was not a permissible subject of bargaining in the New York unit. While the Court recognized that the parties can insist on bargaining over the wages of extra-unit employees where necessary to protect those of unit employees (*Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959)), it noted that this is so only where the terms of employment of extra-unit employees "vitally affect" unit employees (p. 70, quoting from *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971)). Finding that the terms applicable in California could not have vitally affected New York employees, the Court concluded that compliance with the arbitrator's award would have compelled the Company to violate Section 8(a)(1) and (2) of the Act, and that thus the Union's attempt to secure compliance with that award violated Section 8(b)(3).

B. The Proceedings After Remand

1. The Board's Supplemental Decision and Order

Having invited the parties to submit statements of position, and after considering those statements, the Board on January 16, 1975, issued

a supplemental decision and order wherein it concluded that the Section 8(b)(3) allegations of the complaint must be sustained. The order required the Union to cease and desist from:

> (a) Using, or attempting to use, the grievance and arbitration procedures established by its collective-bargaining agreement with Sperry Systems Management Division, Sperry Rand Corporation, covering the certified unit of Metropolitan New York City area employees described below, for the purpose of compelling Sperry Rand to apply the substantive terms of that agreement to unrepresented technical employees engaged by that Company at its Vallejo, California, plant.
>
> (b) In any other manner using the collective-bargaining process as established for the unit of the below-described employees as a means of protesting or otherwise determining the wages, hours, and working conditions of unrepresented employees at Sperry's Vallejo, California, facilities.
>
> (c) Attempting in any like or related manner to expand its established collective-bargaining relationship beyond the bounds of the unit composed of the following employees:
>
> > All draftsmen, engineering aides, industrial illustrators, material lab assistants I and II, materials test coordinators, arts catalogue writers I and II, senior draftsmen, senior draftsmen trainees, senior industrial illustrators, technical illustrators I, II, III, and IV, development technicians and engineering writers I and II, employed at Sperry's plants in Metropolitan New York City, including Nassau and Suffolk Counties, on temporary assignments wherever located from said plants; and/or temporary or permanent assignments from said plants to guards, watchmen, professional employees and supervisors as defined in the Act and all other employees not employed in the included classifications.

2. The Board's subsequent amendment of the order

On February 7, 1975, the Union filed a motion asking the Board to amend its order by substituting for the elimination of occupations in Section 1(c) that contained in Article 2 of the parties' current bargaining agreement. The Union also asked the Board to "mak[e] it clear that the [Union] is not precluded from expanding its collective bargaining relationship beyond the bounds of the current collective agreement by receiving recognition for additional occupations through the processes of accretion, recognition, negotiation or grievance settlement; . . ." On February 26, 1975 the Company filed a response, agreeing to the requested change in the unit description but otherwise opposing the Union's motion.[5]

On June 4, 1975, the Board issued an order amending its January 16, 1975 order by substituting the revised list of job classifications which the parties had agreed to, and by deleting the word "certified" from paragraph 1(a) of the Order. In other respects, the Board denied the Union's request.[6]

3. The Board denies the Union's subsequent requests to modify the order

On July 3, 1975, the Union filed with the Board a motion to further modify its supplemental order by making additional insertions and deletions

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[5] The Company's response also asked that the name of "Benecia" be substituted for "Vallejo" in paragraphs 1(a) and (b) of the Board's order, explaining that the Company's only California operation at that time was located in the latter community.

[6] The Board also denied the Company's request to have the order reflect the alleged transfer of the Company's California facility from Vallejo to Benecia, noting that there was no record evidence of the shift, and, in any event, that the "terms of the Board order are broad enough to protect any interest of the [Company] which underlies its substitution request."

in the unit description in paragraph 1(c) of the order.[7] The Union also asked (using the same language as in its earlier motion) that the Board "mak[e] it clear that the [union] is not precluded from expanding its collective bargaining relationship beyond the bounds of the current collective bargaining agreement by receiving recognition for additional occupations through the processes of accretion, recognition, negotiation or grievance settlement; . . ." In explanation of this request, the Union noted the tendency of unit jobs to change because defense production is a "dynamic" business, and stated that it "assumed that the Board never intended to preclude the modification of the bargaining unit at the Great Neck plant through negotiation, grievance, settlements and arbitrations" (emphasis supplied).

On April 28, 1975, the Board denied the Union's motion. The Board noted that the unit changes at the Great Neck plant had all been known to the Union prior to February 7, 1975 when it filed its first motion to amend the unit description in paragraph 1(c) of the Board's order, and in addition, that the Company opposed further modification of that description. The Board also observed that the Union's request for further modification of paragraph 1(c) was "a repetition, in effect, of the request contained in the earlier motion filed by the [Union] on February 7, 1975." In a footnote, the Board added the following comment:

> Should changes in conditions occur which, in [the Union's] view, require amendment of the unit definition, [the Union], of course, has available to it the unit clarification procedures of the Board. The Board's order, which speaks for itself, in no way limits [the Union's] access to these clarification procedures.

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[7] The affidavits supporting this request indicated that these changes in the composition of the unit came about by agreement of the Union and the Company, and that all were effectuated prior to 1974.

C. The instant proceeding

On October 29, 1975, the Board filed its application for summary entry of a judgment enforcing the Board's order, as amended. On November 11, 1975, the Union filed its opposition. The Union objected to the Board's refusal to change the unit description to reflect the 1971-1973 classification changes which the Company had agreed to, and suggested that its representation of these classifications in the future might expose it to charges of contempt. The Union further argued that the Board had abused its discretion to the extent that its order restricts the Union's "normal collective bargaining activities insofar as the *Metropolitan New York City area emplo*yees are concerned," noting that "insofar as the *Metropolitan New York City area* employees are concerned, there is no evidence that these processes have in the past been abused" (emphasis added). After hearing argument on the Board's summary judgment application on November 25, 1975, the Court denied it, and directed that the matter be added to the day calendar on the first open date.

ARGUMENT

THE BOARD'S ORDER REASONABLY APPLIES ITS BROAD DISCRETION OVER CHOICE OF REMEDIES

A. The applicable principles of law

The Board's remedial authority is derived from Section 10(c) of the Act, which empowers the Board, when it finds a violation of the Act, to issue "an order requiring [the violator] to cease and desist from such unfair labor practice and to take such affirmative action . . . as will effectuate the policies of this Act." In a long line of cases, the Supreme Court has confirmed the Board's broad discretion in devising remedies to expunge the effects of unfair labor practices. See e.g., *N.L.R.B. v. J.H.*

Rutter-Rex Mfg. Co., 396 U.S. 258, 262-263 (1969); *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 612 n. 32 (1969); *Fibreboard Paper Products v. N.L.R.B.*, 379 U.S. 203, 216 (1964); *N.L.R.B. v. Seven Up Bottling Co.*, 344 U.S. 344, 346 (1953); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941); *International Ass'n of Machinists v. N.L.R.B.*, 311 U.S. 72, 82 (1940). As a corollary principle, courts of appeals are not authorized to refuse enforcement of a Board order unless satisfied that the order is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *N.L.R.B. v. Virginia Electric & Power Co.*, 319 U.S. 533, 540 (1943).

More specifically, the boundaries of the Board's discretion in framing cease and desist orders were delineated by the Supreme Court in *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426 (1941). There, the Board, having found only that the employer violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith, "ordered broadly that [the employer] should in effect refrain from violating the Act in any manner whatsoever." *Id.* at 430.[8] The Court held that the Board was not entitled to impose such a sweeping injunction inasmuch as the Board had "made no finding and there is nothing in the record to suggest that the failure of the bargaining negotiations and all that attended them, gave any indications that in the future [the employer] would engage in all or any of the numerous other unfair labor practices defined by the Act." *Id.* at 433.[9]

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[8] The order directed the employer to refrain from "in any manner interfering with, restraining or coering its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in section 7 of the Act"(*ibid.*).

[9] The Court added: "We hold only that the National Labor Relations Act does not give the Board an authority to enjoin violation of all the provisions of the statute merely because the violation of one has been found." *Id.* at 437.

At the same time, the Court made clear that the Board is by no means limited to enjoining only the specific unfair labor practice found. To the contrary, the Board may properly enjoin other acts as long as they "bear some resemblance to that which the [respondent] has committed or [it appears] that danger of their commission in the future is to be anticipated from the course of [the respondent's] conduct in the past." Thus, under these tests, the Board is automatically "free to restrain the practice [found unlawful] and *other like or related unlawful acts*" (*Id.* at 430, emphasis supplied). And it is authorized to restrain other and different violations if it can show "danger of their commission in the future" in light of "the course of [the respondent's] conduct in the past."

B. The Board's order clearly satisfies the *Express Publishing* tests

1. The Board properly refused to amend the unit description a second time

As related *supra*, pp. 7-8, the Board denied the Union's second request to amend paragraph 1(c)'s description of job classifications in the contract unit to reflect additions and deletions in the Great Neck plant during 1971 to 1973 – all accomplished by mutual consent. That ruling was clearly within the Board's discretion. As the Board noted, these changes were known to the Union well before its *first* request to amend, which the Board granted.

Furthermore, the Union can show no prejudice from this ruling. In particular, there is no basis for the Union's contention that its post-decree efforts to represent these "new" job classifications may expose the Union to charges of contempt. There is nothing in the Board's order to prevent the Union from continuing to represent these classifications. Nor, for that

matter, does the order erect any obstacle to its representing *additional* job classifications at the Great Neck plant, assuming the Company agrees that they are properly included in the Union's unit.

2. The Board has properly required the Union to use the Board's processes to gain representation of new classifications of employees unless the Company consents

The Union's main objection is that under the Board's order the Union may not invoke the parties' contractual grievance procedure to establish its right to represent new employee classifications at the Great Neck plant, if the Company challenges its claim, but must use the Board's procedure for clarifying unit boundaries. The Board's order is clearly within the *Express Publishing* guidelines and not an abuse of discretion.

First, the prohibited conduct patently has "some resemblance to that which the [Union] has committed." *Express Publishing, supra.* Thus, the Board's basic finding herein is that the Union abused the contractual grievance procedure in its effort to gain unlawful power over employees outside the bargaining unit. Even that application of the order to which the Union particularly objects – that is, its prohibition against the Union's using the grievance procedure to add new job classifications in the Great Neck plant – clearly addresses a type of conduct very similar to the underlying unfair labor practice. It follows from *Express Publishing* that the Board was presumptively entitled to restrain the Union from expanding its contractual unit in this "like or related manner." There was no need for the Board to establish by additional evidence the likelihood of repetition at the Great Neck plant or anywhere else. Nor does it avail the Union to argue that it never abused the grievance procedure except with respect to the Vallejo employees.

Second, although not required, there is indeed record evidence suggesting the possibility of future, unlawful representation demands by the Union. As described *supra*, pp. 2-3, the Union's original certification, dating from 1962, covered employees at the Company's plant in "Metropolitan New York City, including Nassau and Suffolk Counties . . ." At the present time, the Great Neck plant is the only one in operation. If the Company should open a new plant in "Metropolitan New York City" but at some distance from the Great Neck plant and under separate supervision, which could not be considered an accretion to the Great Neck plant the employees would presumptively be entitled to vote on representation by the Union even if they performed the very jobs described in the Board's order herein. See, e.g., *N.L.R.B. v. Masters-Lake Success, Inc.*, 287 F.2d 35 (C.A. 2, 1961), enforcing in relevant part, 124 NLRB 580. The Union, however, has consistently objected to paragraph 1(c), not because it bars grievances over the Union's efforts to absorb additional Great Neck classifications, but because it bars them "insofar as the Metropolitan New York City area employees are concerned" (Union's Affidavit in Opposition To the Board's Application for Summary Judgment). Thus, there is good reason to believe that, if a new plant is opened, the Union will demand recognition for certain employees even though the plant is clearly not an accretion. It is in the Company's interest – and in the public interest – that such a question be resolved by appropriate Board proceedings, rather than by forcing the Company to grievance arbitration once again.

Finally, it is no gauge of arbitrary action that the Board's order may compel the Union to use the Board's unit clarification procedure to establish *a legitimate claim* to a new job classification – a claim on which it might be entitled to prevail in a grievance proceeding but for the Board's prohibition. It is settled that the Board has the power to prohibit conduct which, but for the Board's remedial order, would satisfy the require-

ments of the Act. See, e.g., *International Ladies Garment Workers Union (Bernhardt-Altman) v. N.L.R.B.*, 366 U.S. 731 (1961). There, the employer violated Section 8(a)(2) of the Act by recognizing a Union in the honest, but erroneous, belief that it represented a majority of the unit employees. The Supreme Court enforced a Board order which precluded the employer from recognizing that union or any other union unless it was certified by the Board. Thus, the employer was justifiably denied access to normal collective bargaining procedures, as was the Union here, because it had abused those procedures in a manner which violated the Act.[10]

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[10] In the same vein, a party to a settlement agreement may be precluded from taking actions which otherwise would have been lawful under existing circumstances, where such conduct is inconsistent with the settlement. *Colonie Hill, Ltd.*, 212 NLRB No. 114, 87 LRRM 1017 (1974), enf'd., 519 F.2d 721 (C.A. 2, 1975). See also, *Poole Foundry & Machine Co. v. N.L.R.B.*, 192 F.2d 740, 743-744 (C.A. 4, 1951), cert. denied, 342 U.S. 954; *N.L.R.B. v. Stant Lithograph, Inc.*, 297 F.2d 782 (C.A. D.C., 1961); *W.B. Johnston Grain Co. v. N.L.R.B.*, 365 F.2d 582, 586 (C.A. 10, 1966); *N.L.R.B. v. Universal Gear Service Corp.*, 394 F.2d 396, 398 (C.A. 6, 1968).

CONCLUSION

For the foregoing reasons, we respectfully submit that the Board's order should be enforced in full.

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January, 1976

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v.	)	
	)	
LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 6th day of January, 1976